

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a 29-year-old high school graduate who has been primarily employed as a truck driver since high school. He began working for respondent June 6, 1989, and last worked for respondent December 6, 1994, when he was injured in a motor vehicle accident while driving his truck. Claimant was treated by both Robert Eyster, M.D., and Perlita Odulio, M.D. The parties have stipulated to a 7 percent functional impairment to the body as a whole.

The issue in contention arises as a result of the work disability restrictions placed upon claimant by Dr. Odulio and the lack of restrictions placed upon claimant by Dr. Eyster. Both doctors were provided copies of two functional capacity evaluations performed on claimant. The first functional capacity evaluation was done by Kathy Renner, licensed physical therapist, on March 15, 1995. The second was performed by Mark Davis, an exercise specialist, on April 11, 1995. Both evaluations found claimant to have provided inconsistent effort during the testing. Mr. Davis, who testified, discussed the claimant's lack of demonstration of pain posturing during the testing while complaining of pain at magnitudes of nine to ten on a one-to-ten scale. Ms. Renner did not testify but her report was placed into evidence during the deposition of Dr. Odulio. The report indicated self-limiting activities on the part of claimant due to discomfort. The inconsistencies noted were no pain posturing while claimant was rating his pain at a level nine and a heart rate which did not increase to even 65 percent of predicted maximum heart rate during the testing. There was also inconsistency in claimant's ability to carry 75 pounds but only lift 20 pounds.

Dr. Eyster, in reviewing the functional capacity assessments, opined claimant suffered no permanent physical restrictions as a result of these injuries. Dr. Eyster found claimant to have no objective physical findings of any problems, on examination, with all tests being normal. He felt his examination results of claimant were consistent with that of Dr. Odulio, although the physical restrictions placed upon claimant by Dr. Odulio were substantially different.

Dr. Odulio, during her physical evaluation of claimant, found claimant able to walk on his heels and toes, found claimant's back to be in good alignment, saw no muscle spasms, felt claimant's strength was within normal limits in the lower extremities and indicated no area of tenderness or sacralgia in the joints or the greater trochanters and observed no atrophy. In effect, both examinations were normal, with the exception of claimant's pain complaints. The MRI performed on January 18, 1995, did reveal degenerative changes at the L5-S1 level although no nerve root impingement was indicated. Dr. Odulio placed specific restrictions upon claimant and, while noting the inconsistencies discussed in the functional capacity evaluations, paid no attention to these observations by Mr. Davis and Ms. Renner.

In proceedings under the Workers Compensation Act the burden of proof is on the claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g). See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Appeals Board in considering the self-limiting behavior of claimant during the functional capacity evaluations and the reliance by Dr. Odulio on the functional capacity evaluations finds claimant has failed to carry his burden of proving entitlement to a work disability. The restrictions placed upon claimant by Dr. Odulio came from the functional capacity evaluation which were questioned by the evaluators, showing less than maximum effort by claimant. Those restrictions were then provided to Mr. James R. Molski who developed a task analysis based on the restrictions placed upon the claimant by Dr. Odulio. That task analysis was then provided to Dr. Odulio for her opinion regarding whether or not claimant could perform the tasks identified in Mr. Molski's evaluation. Unfortunately, the entire process began as a result of information which appears less than credible. The physical exams by both Dr. Eyster and Dr. Odulio found claimant to have no limitation with the exception of self-serving pain complaints. As such the Appeals Board finds claimant has failed to prove his entitlement to a work disability and the award of Administrative Law Judge Nelsonna Potts Barnes dated November 19, 1996, should be, and is hereby, modified. Claimant is awarded the 7 percent functional impairment pursuant to the stipulation of the parties.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 19, 1996, should be, and is hereby, modified and the claimant, Stephen R. Madrigal, is granted an award against Agricultural Carriers, Inc. and Liberty Mutual Insurance Company for an injury occurring on December 6, 1994, for a 7% permanent partial general body disability.

Claimant is entitled to 21 weeks temporary total disability compensation at the rate of \$319 per week followed by 28.63 weeks permanent partial disability compensation at the rate of \$319 per week totaling \$9,132.97 for a total award of \$15,831.97 all of which is due and owing and ordered paid in one lump sum minus amounts previously paid.

Future medical benefits are awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's attorneys fee contract is approved insofar as it is subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Ireland Court Reporting	
Transcript of regular hearing	\$309.60
Deposition of Mark Davis	115.05
Deposition of Robert Eyster, M.D.	120.90
Deposition of Karen Crist Terrill	71.25
 Court reporting Service	
Deposition of Perlita Odulio, M.D.	\$244.80
Deposition of James Molski	177.00

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James P. Johnston, Wichita, KS
Douglas D. Johnson, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director